Supreme Court, U.S.
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No. 98-1729

In The

Supreme Court of the United States

October Term 1998

DANIEL M. McNEIL,

Petitioner,

vs.

STATE OF UTAH, MEDICAID SECTION,

Respondent.

Reply Brief in Support of Petition for Writ of Certiorari to the Utah Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL QUESTIONS SUGGESTED BY RESPONDENT'S BRIEF IN OPPOSITION

1. Does federal law permit the State to grant itself a "priority" claim on the proceeds of a personal injury settlement, where the priority amounts to a lien on the Medicaid recipient?

2. Can the State legitimately claim that its lien is levied against the property of a third-party tortfeasor where the State's actions show that McNeil was the target of the lien?

3. May the State require assignment of an interest from McNeil greater than his "claim" against the third-party tortfeasor for medical expenses paid by Medicaid? May it take a non-proportional share of the settlement proceeds at the expense of other claims owned by McNeil?

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Other Authorities Cited:

V. H. Cooper, Annotation, *Basis and Manner of Distribution Among Multiple Claimants of Proceeds of Liability Insurance Policy Inadequate to Pay All Claims in Full*, 70 A.L.R. 2d 416 (1974) 3

INTRODUCTION

The State's Brief in Opposition contains some significant erroneous statements. Accordingly, Petitioner has elected to file this Reply Brief, which supplies needed and important clarification.

SUPPLEMENTARY STATUTORY PROVISION

Petitioner submits this additional statutory provision (in addition to the eleven others cited in the Petition):

12. The State Assignment of Rights to Benefits Statute -- Utah Code Ann. § 26-19-4.5(1) (1993).

> To the extent that medical assistance is actually provided to a recipient, all benefits for medical services or payments from a third party otherwise payable to or on behalf of a recipient are deemed to be assigned to the department if the department provides, or becomes obligated to provide, medical assistance. That assignment authorizes the department to submit its claim to the third party and authorizes payment of benefits directly to the department. The assignment is effective for services that are paid or to be paid by the department under the state plan, Section 26-18-10, and Title XIX of the federal Society Security Act.

REPLY POINT I

— No "Priority" Under Federal Law —

THERE IS NO PROVISION IN FEDERAL LAW FOR THE STATE TO TAKE A "PRIORITY" CLAIM. THE PRIORITY CONVERTS THE STATE'S CLAIM INTO A FEDERALLY-PROHIBITED LIEN.

The State claims a priority position against McNeil: "This lien has ***priority over all other claims to the proceeds*** . . . . " Utah Code Ann. § 26-19-5(1) (1989) (emphasis added). In support, the State offers only a single sentence asserting the alleged right, but citing no authority. Brief in Opposition, p. 6.

There is no provision in federal law which allows the State a "priority over all other claims." One would think that something as important as a "priority" would be explicitly mentioned. The absence of any provision for a priority in federal law is dispositive against the State on this issue.

Various federal statutes are inconsistent with a priority for the State. For example, the anti-lien and no-recovery statutes in 42 U.S.C. § 1396p(a) and (b) would prohibit any device, like a priority, which operates as a *de facto* lien. Federal statutes and regulations repeatedly admonish states to seek recovery against liable third parties, but a priority operates as a recovery directly against the injured person's third-party claims. *See* Reply Point II below.

The State admits that the validity of its lien is based on the *ipse dixit* self-grant of priority:

> ***Because*** the State's reimbursement claim has ***priority over other claims,*** a lien is placed on proceeds payable from the third party in order to safeguard its priority.

Brief in Opposition, p. 6 (emphasis added). In other words, the State wouldn't have a valid lien without the "priority over other claims." *Id.* However, the State never explains the crucial issue of how it allegedly acquired this "priority over all other claims to the proceeds." Utah Code Ann. § 26-19-5(1).

If there is no priority for the State's claim, then it would have equal status with McNeil's claim to the settlement proceeds. The claims would accordingly be apportioned in order to divide the proceeds which are insufficient to pay the full value of each claim. V. H. Cooper, Annotation, *Basis and Manner of Distribution Among Multiple Claimants of Proceeds of Liability Insurance Policy Inadequate to Pay All Claims in Full*, 70 A.L.R. 2d 416, 417 (1974); *Castoreno v. The Western Indemnity Company, Inc.*, 515 P.2d 789, 794 (Kansas 1973); *Goad v. Fisher*, 257 A.2d 433, 436-7 (Md. App. 1969).

Allowing the State a priority claim amounts to a *de facto* lien or recovery against McNeil because it appropriates part of his proportional share of the inadequate settlement. By way of illustration, assume the total tort claim is valued at $500,000, which includes the State's $43,000 claim. McNeil's claims for pain and suffering, impaired earning capacity, future medicals and past medicals not paid by Medicaid, equal about $457,000. Medicaid would be entitled to approximately 9% of the settlement proceeds (43K / 500K), and McNeil would be entitled to approximately 91% of the proceeds. Thus, in dollar terms, the State Medicaid Agency would clear about $7,300 (1/9 of $85,000) instead of the $43,000 it actually took. This $36,000 difference is a "recovery" directly from McNeil's proportional share of the proceeds. Unless this Court acts,

McNeil, as well as thousands of other Medicaid recipients with third-party claims, will go under- or uncompensated because of illegal priority claims asserted by the State.

REPLY POINT II

— Lien is Against McNeil, Not the Third Party —

THE STATE'S CLAIM THAT ITS LIEN IS ACTUALLY AGAINST THE THIRD-PARTY TORTFEASOR'S PROPERTY IS A DISINGENUOUS ATTEMPT TO AVOID THE FEDERAL ANTI-LIEN STATUTE. UNDISPUTED FACTS SHOW THAT THE LIEN IS AGAINST McNEIL.

The State says "that the Medicaid lien is placed on the liable third party's property, not property of the Medicaid recipient . . . [and] therefore . . . does not violate federal law." Brief in Opposition, p. 8. In reality, the State's actions bespeak the intent to lien McNeil, not the third parties.

1. Lien Does Not Identify Third Party as the Obligor. The Notice of Lien is addressed *to McNeil's counsel,* and identifies McNeil as the *obligor* at least seven times. *See* Appendix K (all Appendix references to Petitioner's main brief). There is *no mention of the third-party tortfeasors or their insurers,* a strange omission if the lien was really intended to apply to that individual and his insurance company. *See* Appendix K, p. 43a. The State was sued by the third parties in March 1995, so by August 1995, the State had at least five months to identify Wallace and Allstate as lienees if that had really been intended.

2. Cross-claim Against McNeil, Not Third Party. When sued by the responsible third parties in interpleader, the State answered and filed a "cross-claim" *against McNeil* for a money judgment. *See* Appendix L, p. 45a. The State neither raised an affirmative defense nor counterclaimed against the liable third parties.

3. Request for Attorneys Fees Against McNeil. The Cross-claim seeks recovery of "attorneys fees and costs" *against McNeil,* not the third parties. Appendix L, p. 48a, ¶ 4.

4. Unrebutted Allegation that Settlement was McNeil's Property. The State fails to challenge McNeil's detailed citation of Utah statutes showing that his claim is a chose in action and a protected property right. McNeil's Petition, p. 24. This is a *de facto* admission that those statutes *do create a property interest* in McNeil, and not the third party.

The State's claim that its lien attached to the property of the third-party tortfeasors is a subterfuge to avoid application of the unambiguous federal anti-lien statute. The State's consistent statements and actions throughout the litigation demonstrate convincingly that its lien was intended to attack McNeil and his third-party tort settlement.[1] The State is estopped to now claim otherwise.

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[1] Respondent claims that some of the cases relied on by Petitioner allegedly don't concern third-party liability proceeds, but deal with estate recovery, and therefore are not relevant. All the cases cited by Petitioner in Point II of the Petition stand clearly for the proposition that the federal anti-lien provisions in § 1396p do indeed *prohibit the assessment of liens against Medicaid recipients.* Therefore, there is a definite conflict in the case law that is not explicable in terms of whether the specific case dealt with the estate of an individual or a third-party liability claim.

REPLY POINT III

— Assignment of "Claim," Not "Proceeds" —

THE STATE PURPORTS TO TAKE AN ASSIGNMENT OF AN INTEREST GREATER THAN McNEIL'S "CLAIM" AGAINST THE THIRD-PARTY TORTFEASOR FOR MEDICAL EXPENSES PAID BY MEDICAID. THIS ILLEGALLY LIENS McNEIL'S SHARE OF THE SETTLEMENT PROCEEDS.

The Utah Supreme Court held the federal anti-lien statute was not violated "because the third-party settlement ***proceeds*** have been specified by the recipient as belonging to the State Medicaid Agency as a precondition of the recipient's eligibility." *Wallace v. Jackson,* 972 P.2d 446, 448 (Utah 1998) (emphasis added). No authority is cited in the Opinion or the State's Brief for the proposition that McNeil had assigned "proceeds," as opposed to a "claim."

Assignment of a right to "claim" against the tortfeasor is vastly different than a priority lien on the actual settlement "proceeds." *See* Reply Point I. Numerous federal and state statutes and rules show that the State is assigned only a "claim" ***against the liable third party,*** not actual settlement "proceeds." Some examples are:

Statute/Rule:	Third Party Context:
1396a(a)(25)(A)	- "State . . . will take all reasonable measures to ascertain the ***legal liability of third parties*** . . ."

1396a(a)(25)(I)	-	"Where a ***third party has a legal liability*** to make payment . . . the state is considered to have acquired the rights . . . "
1396k(a)1(A)	-	"required to assign the state any ***rights . . . to payment*** for medical care ***from any third party;"***
1396k(a)1(C)	-	"cooperate with the state . . . in pursuing ***any third party who may be liable . . .***"
42 CFR § 433.137	-	"A state plan must provide . . . for determining legal ***liability of third parties*** to pay for services . . . "
42 CFR § 433.145	-	"recipient is required to: assign to the Medicaid agency . . . rights . . . to payment for medical care ***from any third party; . . .***"

(All emphasis added.) There are a dozen other similar citations.

The State's own assignment statute provides a great example of the State's limited "claim" as opposed to a lien on "proceeds." Subject to the amount actually paid, the right to "payments from a third party" is "deemed to be assigned to the State." Utah Code Ann. § 26-19-4.5 (1993) (quoted on page 1 of this Reply Brief). Further, "[t]he assignment authorizes the department to submit its ***claim*** to the third party." (Emphasis added.) Thus, the State's own statute characterizes its interest as a ***"claim to the third party,"*** not a lien on the proceeds. *Id.*

The State's conversion of its "right of claim" into a priority taking of the settlement "proceeds" is illegal because it

constitutes a *de facto* lien or recovery directly on McNeil's property. Whereas the State owns the claim for medical expenses actually paid by Medicaid, McNeil owns the claim for pain and suffering, lost income, etc. The two claims stand on equal footing under federal law.

There is no statutory disharmony or gutting of the mandatory reimbursement statutes, as the State claims. Is it "disharmonious" if the State is accustomed to getting 100% of its lien, wrongly, and now must settle for a proportional share as provided by the statutes? This is not legitimate "disharmony." After all, there is no provision in federal law which somehow guarantees state Medicaid agencies 100% recovery. In this context, the State's claim that McNeil's "strained interpretation . . . would gut . . . mandatory reimbursement" is vacuous. Federal anti-lien and anti-recovery statutes prohibit state Medicaid agencies from consuming all or part of claims owned by recipients.

The State claims that under § 1396k(b), it is entitled to retain the first cash of any money it collects in order to satisfy its lien claim. Brief in Opposition, p. 5. The State's summary of the statute seriously misrepresents its meaning and context. Subsection (b) follows a lengthy Subsection (a) wherein § 1396k's context is clear that "the individual is required . . . ***to assign*** the state any ***rights . . . to payment*** for medical care from any third party" (emphasis added). This "right to payment from any third party" is simply a "claim" against the third party. McNeil has the same "rights . . . to payment" for his claims against the third party.

Subsection (b) does not create any new collection right. Its collections occur pursuant to the ***"assignment made under the provisions of this section,"*** i.e., the Subsection (a) assignment. 42 U.S.C. § 1396k(b) (emphasis added).

Subsection (a) provides only the right to claim against a third party. This is not the right to grab the first cash available at the expense of the recipient, as claimed by the State.

CONCLUSION

Federalism is a coin with two sides. On the one hand, states should be free to act without federal interference in their realm. On the other hand, federal supremacy dictates that states must not disobey or undermine specific federal laws in programs they have voluntarily adopted and promised to follow.

If the State can evade application of an explicit federal statute like § 1396p by legerdemain ("the lien is against the third party's property"), then no federal statute is safe. Clever state lawyers looking for revenue sources will always find some loophole to avoid unpleasant application of a federal statute.

Three facts are paramount: § 1396p unambiguously prohibits liens and recoveries against recipients, the State lien attacks McNeil, and there is no legal authority to support priority for the State. It is therefore important for this Court to exercise certiorari jurisdiction and reverse the Utah Supreme Court for failure to follow federal law.

DATED this 12th day of July, 1999.

Respectfully Submitted,

s/ Robert B. Sykes
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